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17CV21515

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7 IN THE CIRCUIT COURT FOR THE STATE OF OREGON  
8 COUNTY OF MULTNOMAH

9 **ZURICH AMERICAN INSURANCE  
COMPANY, as subrogee of S.D. Deacon  
Corp. of Oregon,**

11 Plaintiff,

12 vs.

13 **KINSALE INSURANCE COMPANY,**

14 Defendant.

Case No.:

**COMPLAINT**

NOT SUBJECT TO  
MANDATORY ARBITRATION

Amount Claimed: \$363,887.69

ORS § 21.160 (1)(c)

Filing Fee: \$531.00

15 Plaintiff Zurich American Insurance Company, through the undersigned counsel of  
16 record, hereby states and alleges the following:

17 **I. PARTIES**

19 1.

20 Zurich American Insurance Company ("Zurich") is a New York corporation engaged in  
21 the insurance business, with a statutory home office located at One Liberty Plaza, 165 Broadway,  
22 32<sup>nd</sup> Floor, New York, New York 10006, and a principal place of business located at 1299  
23 Zurich Way, Schaumburg, Illinois 60196. Zurich is authorized to transact business and has  
24 transacted business in Oregon.

25 ///

26 COMPLAINT-I

LAW OFFICES OF  
**SHUMSKY & BACKMAN**  
1001 SW FIFTH AVENUE, SUITE 1100  
PORTLAND, OR 97204  
TELEPHONE (503) 222-4339

1  
2. 2.

3 Kinsale Insurance Company ("KIC") is a foreign corporation and at all times relevant  
4 hereto was transacting business in the State of Oregon as a surplus lines insurer.

5 3. 3.

6 At all times relevant hereto, Zurich issued liability insurance policy number GLO  
7 2979135-11 to S.D. Deacon Corp. of Oregon ("SDD"), for the period November 1, 2013 to  
8 November 1, 2014 (the "Zurich Policy").

9 4. 4.

10 At all times relevant hereto, KIC issued insurance policy number 0100013013-0 to Time  
11 Frame, Inc. for the period July 13, 2013 through July 13, 2014 (the "KIC Policy"). The KIC  
12 Policy named SDD as an additional insured.

13 5. 5.

14 Time Frame, Inc. was a licensed contractor with a principal place of business in  
15 Multnomah County Oregon.

16 **II. GENERAL ALLEGATIONS**

17 6. 6.

18 SDD was the general contractor for the Seaside Hotel located in Seaside, Oregon (the  
19 "Subject Property") pursuant to a contract entered into with Seaside Lodging and Hospitality,  
20 LLC (the "Owner").

21 7. 7.

22 On September 4, 2013, Time Frame Inc. entered into a subcontract agreement with SDD  
23 to perform construction work at the Subject Property.

24  
25  
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COMPLAINT-2

LAW OFFICES OF  
SHUMSKY & BACKMAN  
1001 SW FIFTH AVENUE, SUITE 1100  
PORTLAND, OR 97204  
TELEPHONE (503) 222-4339

8

The SDD/Time Frame, Inc. subcontract provided that Time Frame, Inc. would obtain liability insurance with an additional insured endorsement naming SDD as an additional insured and that said insurance would be primary and non-contributing to any insurance maintained by SDD.

9

The KIC policy was endorsed to identify SDD as additional insured and it also provided that the KIC policy was primary and non-contributing to any insurance maintained by SDD.

10.

On December 22, 2103, Brandon Cook, an employee of Time Frame, Inc. was injured while performing at the Subject Property.

11.

Brandon Cook filed suit against SDD for money damages in the Multnomah County Circuit Court, Case Number 14CV19323 (“Litigation”).

12.

SDD tendered the defense and indemnity of the Litigation to KIC.

13.

KIC accepted the partial defense of the Litigation, but has refused to pay the outstanding defense costs in the amount of \$13,887.69. Zurich, on behalf of SDD paid the outstanding defense costs.

11

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**COMPLAINT-3**

LAW OFFICES OF  
SHUMSKY & BACKMAN  
1001 SW FIFTH AVENUE, SUITE 1100  
PORTLAND, OR 97204  
TELEPHONE (503) 222-4339

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2                   14.

3                   On August 12, 2016, Zurich settled the Litigation for \$350,000.00, after KIC refused to  
4 contribute to the settlement, thus refusing its obligation to indemnify SDD.

5                   **III. LIABILITY**

6                   **(Count One--Equitable Contribution)**

7                   15.

8                   Zurich had a contractual obligation to provide a defense and indemnity to SDD in  
9 connection with the Litigation.

10                  16.

11                  KIC also had a contractual obligation to provide a defense and indemnity to SDD, which  
12 was primary to the obligation of Zurich.

14                  17.

15                  KIC refused to provide a complete defense and indemnity to SDD.

16                  18.

17                  Zurich incurred costs and expenses to defend and indemnify the parties' common insured,  
18 which was the primary obligation of KIC, and in so doing, incurred damages in the amount of  
19 363,887.69, plus attorney fees and costs pursuant to ORS 742.061.

21                  **(Count Two—Contractual Subrogation)**

22                  19.

23                  KIC had a contractual obligation to provide a defense and indemnity for SDD in  
24 connection with the Litigation.

25                  ///

26  
COMPLAINT-4

20.

KIC breached the terms of the KIC Policy by failing to provide a complete defense and indemnity to SSD.

21.

As a result of KIC's breach of its policy in the manner aforesaid, SDD sustained damages consisting of defense costs and indemnity payments in the amount of \$363,887.69.

22.

By virtue of its payment of the defense costs and indemnity payments, Zurich is contractually subrogated to SDD's rights against KIC.

23.

Zurich is entitled to damages from KIC in the amount of \$363,887.69, plus attorney fees and costs pursuant to ORS 742.061.

**(Count Three—Equitable Subrogation)**

24.

KIC's refusal to provide SDD with a complete defense and indemnity in connection with the Litigation was a breach of its duties owed to SDD and Zurich.

25

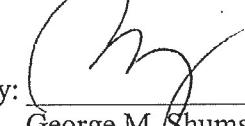
The defense costs and indemnity payments incurred by Zurich satisfied a debt owed by SDD, for which TIC was primarily liable.

26

KIC was unjustly enriched as a result of Zurich's payment of the defense costs and indemnity payments in connection with the Litigation.

**COMPLAINT-5**

LAW OFFICES OF  
SHUMSKY & BACKMAN  
1001 SW FIFTH AVENUE, SUITE 1100  
PORTLAND, OR 97204  
TELEPHONE (503) 222-4339

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2 27.  
3  
4 Zurich has a right of equitable subrogation to recover the amount KIC has been unjustly  
5 enriched, namely \$363,887.69, plus attorney fees and costs pursuant to ORS 742.061.  
6  
7 WHEREFORE, Zurich prays for entry of judgment in its favor against KIC in the  
8 amount of \$363,887.69 plus attorney fees, pre-judgment interest at the rate of nine percent per  
9 annum, costs, and such other and further relief as this court may deem just and equitable.  
10  
11 Dated this 26 day of May 2017.  
12  
13 SHUMSKY & BACKMAN  
14 By:   
15 George M. Shumsky, OSB#951468  
16 Fax: (877) 222-4339  
17 E-Mail: [george@shumsky-backman.com](mailto:george@shumsky-backman.com)  
18 Of Attorneys for Plaintiff  
19  
20 Trial Attorney: George M. Shumsky  
21  
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COMPLAINT-6  
LAW OFFICES OF  
SHUMSKY & BACKMAN  
1001 SW FIFTH AVENUE, SUITE 1100  
PORTLAND, OR 97204  
TELEPHONE (503) 222-4339

6/19/2017 9:21:18 AM  
17CV21515

### AFFIDAVIT OF SERVICE

State of Oregon

County of Multnomah

Circuit Court

Case Number: 17CV21515

Plaintiff:  
**ZURICH AMERICAN INSURANCE COMPANY**

vs.

Defendant:  
**KINSALE INSURANCE COMPANY**

For:  
George M. Shumsky  
Shumsky and Backman - OR  
P.O. Box 56028  
Portland, OR 97238-6028

Received by MALSTROM'S PROCESS SERVING CO. on the 8th day of June, 2017 at 4:42 pm to be served on **KINSALE INSURANCE COMPANY C/O: SWETT & CRAWFORD CORP., R/A: CT CORPORATION SYSTEM, 388 STATE ST, STE 420, SALEM, OR 97301**.

I, Alice McAllister, being duly sworn, depose and say that on the **9th day of June, 2017 at 9:55 am**, I:

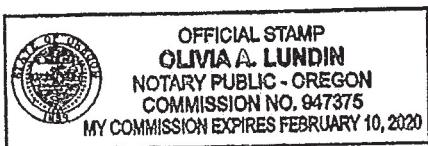
SERVED the within named **KINSALE INSURANCE COMPANY C/O: SWETT & CRAWFORD CORP., R/A: CT CORPORATION SYSTEM at 388 STATE ST, STE 420, SALEM, OR 97301** by personally serving a true copy of the **Summons and Complaint** upon **RYLYNN POOLE**, who is a clerk on duty in the office of the Registered Agent and who is authorized to accept service.

Description of Person Served: Age: 44, Sex: M, Race/Skin Color: CAUCASIAN, Height: 6'3", Weight: 195, Hair: BLONDE, Glasses: Y

I declare under penalty of perjury that I am a resident of the State of Oregon. I am a competent person 18 years of age or older and not a party to or attorney in this proceeding and am authorized to serve the process described herein. I certify that the person, firm, or corporation served is the identical one named in this action. I am not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise.

Subscribed and Sworn to before me on the 12th day of June, 2017 by the Affiant, who is personally known to me.

*Olivia Lundin*  
NOTARY PUBLIC-OREGON



*Alice McAllister*  
Alice McAllister  
Process Server

MALSTROM'S PROCESS SERVING CO.  
155 Culver Lane S  
Salem, OR 97302  
(503) 585-0234

Our Job Serial Number: ONE-2017003209  
Ref: 801-704



IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

ZURICH AMERICAN INSURANCE  
COMPANY, as subrogee of S.D. Deacon Corp.  
of Oregon,

Plaintiff,

vs.

KINSALE INSURANCE COMPANY,

Defendant.

Case No.: 17CV21515

SUMMONS

To: Kinsale Insurance Company, c/o Swett & Crawford Corp., Defendant.

You are hereby required to appear and defend the complaint filed against you in the above entitled action within thirty (30) days from the date of service of this summons upon you, and in case of your failure to do so, for want thereof, plaintiff(s) will apply to the court for the relief demanded in the complaint.

**NOTICE TO THE DEFENDANT:  
READ THESE PAPERS CAREFULLY!**

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service upon the plaintiff.

If you have any questions, you should see an attorney immediately. If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.

SIGNATURE OF ATTORNEY/AUTHOR FOR PLAINTIFF

George M. Shumsky 951468  
ATTORNEY'S/AUTHOR'S NAME BAR NO.

1001 SW 5<sup>th</sup> Avenue, Suite 1100

ADDRESS

Portland, OR 97204 503-222-4339  
CITY STATE ZIP PHONE

TRIAL ATTORNEY IF OTHER THAN ABOVE

\* \* \* \* \*

STATE OF OREGON; County of Multnomah} ss.

I, the undersigned attorney of record for the plaintiff, certify that the foregoing is an exact and complete copy of the original summons in the above-entitled action.

ATTORNEY OF RECORD FOR PLAINTIFF(S)

\* \* \* \* \*

TO THE OFFICER OF OTHER PERSON SERVING THIS SUMMONS: You are hereby directed to serve a true copy of this summons, together with a true copy of the complaint mentioned therein, upon the individual(s) or other legal entity(ies) to whom or which this summons is directed, and to make your proof of service on the reverse hereof or upon a separate similar document which you shall attach hereto.

ATTORNEY(S) FOR PLAINTIFF(S)

## PROOF OF SERVICE

STATE OF \_\_\_\_\_  
County of \_\_\_\_\_

I hereby certify that I made service of the foregoing summons upon the individuals and other legal entities to be served, named below, by delivering or leaving true copies of said summons and the complaint mentioned therein, certified to be such by the attorney for the plaintiff, as follows:

## Personal Service Upon Individual(s)

Upon \_\_\_\_\_, by delivering such true copy to him/her, personally and in person, at \_\_\_\_\_, on \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_.m.

## Substituted Service Upon Individual(s)\*\*

Upon \_\_\_\_\_, by delivering such true copy to his/her dwelling house or usual place of abode, to-wit: \_\_\_\_\_, to \_\_\_\_\_, who is a person over the age of 14 years and a member of the household of the person served on \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_.m.

Upon \_\_\_\_\_, by delivering such true copy to his/her dwelling house or usual place of abode, to-wit: \_\_\_\_\_, to \_\_\_\_\_, who is a person over the age of 14 years and a member of the household of the person served on \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_.m.

## Office Service Upon Individual(s)\*\*

Upon \_\_\_\_\_, at the office which he/she maintains for the conduct of business as \_\_\_\_\_, by leaving such true copy with \_\_\_\_\_, the person who is apparently in charge, on \_\_\_\_\_, 20\_\_\_\_\_, during normal working hours, at to-wit: \_\_\_\_\_ o'clock \_\_\_\_\_.m.

Service on Corporations, Limited Partnerships or Unincorporated Associations  
Subject to Suit Under a Common Name

Upon \_\_\_\_\_, by \_\_\_\_\_  
(NAME OF CORPORATION, LIMITED PARTNERSHIP, ETC.)  
(a) delivering such true copy, personally and in person, to \_\_\_\_\_ who is a/the thereof; OR  
(b) leaving such true copy with \_\_\_\_\_, the person who is apparently in charge of the office of \_\_\_\_\_, who is a/the \* \_\_\_\_\_ thereof,  
\*Specify registered agent, officer (by title), director, general partner, managing agent.

at \_\_\_\_\_, on \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ o'clock, \_\_\_\_\_.m.

DATED:

I further certify that I am a competent person 18 years of age or older and a resident of the state of service or the State of Oregon, and that I am not a party to nor an officer, director or employee of, nor attorney for any party, corporate or otherwise; that the person, firm or corporation served by me is the identical person, firm or corporation named in the action.

SHERIFF

By \_\_\_\_\_

DEPUTY

DATED: \_\_\_\_\_

SIGNATURE \_\_\_\_\_

TYPE OR PRINT NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

PHONE \_\_\_\_\_

The signature lines on the left should be used only by an Oregon county sheriff or deputy; all other servers complete certificate on the right. The Proof of Service above contains most, but not all, of the methods of service. For example, this form does not include proof of service on a minor or incompetent person. See ORCP 7D.(2) and 7D.(3) for complete service methods on particular parties. \*\*Where substituted or office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode, together with a statement of the time, date and place at which such service was made. Use S-N Form No. 1149 or equivalent.